No. 17-1351

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, a project of the Urban Justice Center, Inc., et al.,
Plaintiffs-Appellees,

v.

DONALD TRUMP, President of the United States, et al.,
Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

BRIEF OF *AMICI CURIAE*
IMMIGRATION LAW SCHOLARS AND CLINICIANS
ON STATUTORY CLAIMS
IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF INTEREST

Amici are immigration scholars and clinicians at law schools. Amici have personal, professional, and academic connections to individuals impacted by Executive Order 13780 (Mar. 6, 2017) ("EO"). In addition, as scholars and practitioners of immigration law, they have an interest in ensuring correct and just interpretations of the Immigration and Nationality Act ("INA").

Immigration clinics—and attorneys within those clinics—have had direct experiences with clients, students, and faculty who have sought their assistance with immigration concerns resulting from the Executive Orders barring entry to individuals from certain countries. Immigration clinics worked hard to assist individuals detained at airports and stranded abroad amidst confusion after Executive Order 13769 (Jan. 17, 2017) was issued. They continue to provide legal advice, conduct community workshops, undertake research, and represent clients affected by the EO.

Amici submit this brief under Fed. R. App. P. 29. All parties have consented to the filing of this brief.

INTRODUCTION

The district court did not abuse its discretion and properly issued a nationwide, temporary injunction staying implementation of the EO. The EO bars entry to individuals from six countries: Iran, Libya, Somalia, Sudan, Syria, and

Yemen. The Government concedes that the EO will halt the issuance of immigrant (permanent) and nonimmigrant (temporary) visas to individuals based on their national origin. As a result, the EO violates the nondiscrimination provision in 8 U.S.C. § 1152(a)(1)(A), which applies to the issuance of immigrant visas (i.e. visas that lead to lawful permanent residence upon entering the United States). Basic principles of statutory interpretation require the Court to give effect to this nondiscrimination requirement, which the Government's overbroad interpretations of 8 U.S.C. § 1182(f) and 8 U.S.C. § 1185(a)(1) eviscerate.

In addition, the EO violates the statutory provision requiring conditions for nonimmigrant (temporary) visas to be set by regulation, which the Government ignores. 8 U.S.C. § 1184(a)(1). By failing to establish new conditions on nonimmigrant (temporary) visas through regulation, the Government circumvented the invaluable notice and comment process, without even attempting to invoke any of the good cause exceptions. In any case, none of the good cause exceptions apply to the present situation, as the Government has failed to demonstrate any true emergency.

Even if this Court decides that the "facially legitimate and bona fide" standard applies in this case, the EO is unlikely to satisfy that standard, justifying implementation of a nationwide stay with respect to both immigrants and nonimmigrants.

Finally, the doctrine of consular nonreviewability does not bar Plaintiffs' claims because two of the exceptions to that doctrine apply here: (1) Plaintiffs allege violations of their own constitutional rights, along with their statutory claims; and (2) Plaintiffs challenge the Government's authority to take or not take an action, as opposed to a discretionary decision. The law and facts therefore compel upholding the district court's order.

ARGUMENT

I. THE EO VIOLATES THE NONDISCRIMINATORY PROVISION OF THE INA BY EFFECTIVELY BARRING THE ISSUANCE OF IMMIGRANT (PERMANENT) VISAS BASED SOLELY ON NATIONALITY.

This case requires the Court to construe the relationship between the nondiscrimination requirement in 8 U.S.C. § 1152(a)(1)(A) and the power given to the President to suspend classes of aliens in 8 U.S.C. § 1182(f). Applying well-established principles of statutory interpretation helps interpret these two provisions. Under those principles, the first step is to try to harmonize the two statutes. If they cannot be harmonized, the more specific, later enacted provision should supersede the more general, earlier enacted one. Either way, the EO violates § 1152(a)(1)(A).

A. The Court Can Harmonize the Statutes Because § 1182(f) Does Not Fall Under Any of the Exceptions in § 1152(a)(1)(A).

The District Court correctly found—and the Government concedes—that implementing § 2(c) of the EO would halt the issuance of visas to persons from Iran, Libya, Somalia, Sudan, Syria, and Yemen. J.A. 21 (*District Court Order*); *see also* Gov't Br. at 31 ("There is no reason to issue a visa to an alien whose entry is barred by a valid invocation of the President's Section 1182(f) authority—and nothing in Section 1152(a)(1)(A) compels such a fruitless exercise."); Gov't Br. at 34, n. 12 ("The State Department would implement that suspension by declining to issue visas to aliens who are covered by the Order and who are not found eligible for a waiver."). The State Department also lists 8 U.S.C. § 1182(f) as one of the grounds for refusing a visa. *See* U.S. Dep't of State, 9 *Foreign Affairs Manual* 301.4-1(a), (b)(12) (2016). Thus, although the EO only technically suspends "entry" to the United States, it is undisputed that the EO directly impacts the issuance of visas.

Because the EO would result in the denial of immigrant (permanent) visas to individuals from six countries based solely on their nationality, it violates the non-discrimination provision in 8 U.S.C. § 1152(a)(1)(A), which provides:

> Except as specifically provided in paragraph (2) and in sections 101(a)(27), 201(b)(2)(A)(i), and 203 [of the INA], no person shall receive any preference or priority or be discriminated against in the issuance of an

> immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence.[1]

Congress amended the INA to include this non-discrimination provision in 1965, thirteen years after enacting 8 U.S.C. § 1182(f), which authorizes the President to suspend the entry of "any class of aliens" whose entry "would be detrimental to the interests of the United States." *See* 89 Pub. L. No. 89-236, 79 Stat. 911 (1965).

The first step is to try to harmonize § 1152(a)(1)(A) and § 1182(f). *See, e.g., Inhabitants of Montclair Tp. v. Ramsdell,* 107 U.S. 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute"). The simplest way to harmonize these statutory provisions is to recognize that § 1152(a)(1)(A) expressly excludes several provisions of the INA from its nondiscrimination requirements, but *not* the President's authority under § 1182(f). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman v. Maretta*, 133 S.Ct. 1943, 1953 (2013) (alteration in original) (citing *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616–17 (1980)).

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[1] Although the analysis of § 1152(a)(1)(A) in this brief focuses on immigrant (permanent) visas based on the plain language of the statute, constitutional arguments discussed in other briefs support a broader application of nondiscrimination principles.

Here, the legislative intent behind the 1965 amendments that added § 1052(a)(1)(A) was to end discrimination based on national origin. As the district court recognized, Congress expressly adopted the Immigration and Nationality Act of 1965 to abolish the "national origins system." The Immigration Act of 1924 imposed the system through yearly immigration quotas for particular nations based on the percentage of foreign-born individuals of that nationality who were living in the continental United States according to the 1920 census. The purpose of the system was to "maintain, to some degree, the ethnic composition of the American people." H. Rep. No. 89-745, at 9 (1965). When Congress imposed the system, it was "acting in part on the basis of explicit eugenic theories now readily seen as racist," as "[t]he quota laws reserved the largest allocations for what Congress considered the more desirable nationalities of Northern Europe." David A. Martin, *Major Issues in Immigration Law,* FJC-ETS-87-1 (1987). Eliminating the national origins system was therefore a "a triumph of the principle that immigrant admissions should be based on criteria that do not discriminate by nationality." *See* Hiroshi Motomura, *Who Belongs? Immigration Outside the Law and the Idea of Americans in Waiting,* 2 UC IRVINE L. REV. 359, 371 (2012) An exception that would allow the President to discriminate on the basis of national origin, then, is not only unexpressed in the statute but also cannot be implied since Congressional intent was to the contrary.

Finding no exception under § 1152(a)(1) for an exercise of authority under § 1182(f) would also align with the anti-discriminatory object and purpose of the 1965 amendments to the INA. *See Richards v. United States*, 369 U.S. 1, 11 (1962) ("in fulfilling [its] responsibility in interpreting legislation, must not be guided by a single sentence or member of a sentence, but (should) look to the provisions of the whole law, and to its object and policy") (citations omitted); *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S.Ct. 2507 (2015) (reasoning that antidiscrimination laws should be construed to include disparate impact claims where that interpretation is consistent with statutory purpose); *Jones v. Am. Postal Workers Union*, 192 F.3d 417, 428 (4th Cir. 1999) (finding that the EEOC's interpretation "fully comports with Congress' primary purpose in enacting [Title VII and the ADA] of eradicating certain employment discrimination").

The Government attempts to rely on an exception in § 1152(a)(1)(B), which states that § 1152(a)(1)(A) does not "limit the authority of the Secretary of State to determine the *procedures* for the processing of immigrant visa applications or where such applications will be processed."[2] 8 U.S.C. § 1152(a)(1)(B) (emphasis added); Gov't Br. at 33. According to the Government, § 2(c)'s suspension of entry falls within this exception for rules governing processing "procedures." The district court correctly rejected this argument for two reasons. First the district court found that the word "procedures" does not cover suspending entry of certain groups. J.A.792. Second the district court found that this exception applies, by its plain language, to the Secretary of State, not to the President.[3] *Id.*

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[2] On September 30, 1996, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) (enacted as Division C of the Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009). Section 633 of the IIRIRA amended the Immigration and Nationality Act (INA) by adding 8 U.S.C. § 1152(a)(1)(B). *See* 142 Cong. Rec. H11,827 (daily ed. Sept. 28, 1996).

An EO that renders new classes of aliens—six nationalities—inadmissible to the United States cannot reasonably be construed as a "procedure" for processing immigrant (permanent) visas. By barring classes of aliens based on nationality, § 2(c) of the EO creates a substantive change in the law. Unlike procedural rules, substantive rules are those "affecting individual rights and obligations," as § 2(c) clearly does. *Morton v. Ruiz,* 415 U.S. 199, 232 (1974). Further, Merriam-Webster's Online Dictionary defines procedure as "a particular way of accomplishing something or acting," "a series of steps followed in a regular definite order," or, with respect to legal procedures, "one or more methods or steps for the enforcement or administration of rights, duties, justice, or laws."[4] The EO does not set forth particular methods or steps for accomplishing something. Rather, § 2(c) renders new classes of aliens inadmissible, which is a substantive change.

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[3] The regulations implementing the INA distinguish between processing of visa applications by the State Department and processing of visa petitions by other parts of the Executive Branch, confirming that statutory provisions directed to one agency do not necessary apply to another, much less a Presidential EO. *Cf.* 8 C.F.R. § 204 (DHS's regulations for processing of visa petitions) *with* 22 C.F.R. §§ 42.61 to 42.74 (State Department's regulations for processing of visa applications by aliens).

[4] *See* https://www.merriam-webster.com/dictionary/procedure (last visited Apr. 17, 2017).

The procedures for consular officials to process visas are starkly different from the substantive change in the EO. For example, the State Department regulation titled "Procedure in issuing visas" addresses steps such as insertion of data, arrangement of documents, signature, seal, and issuance of a visa. 22 C.F.R. § 42.73. Similarly, procedures listed in the Foreign Affairs Manual include steps such as ensuring that the necessary documentation is provided, checking the availability of visa numbers, scheduling appointments, conducting interviews, collecting fees, and adjudicating applications. 9 *Foreign Affairs Manual* 504.1. These are the types of "procedures" that would fall within the ambit of 8 U.S.C. § 1152(a)(1)(B). An EO suspending entry of new classes of aliens bears no resemblance to these procedures.

In arguing that "procedures" encompass the suspension of entry in § 2(c), the Government relies on two cases from other circuit courts that involve FCC orders and have nothing to do with the INA, much less the exception in § 1152(a)(1)(B). *See* Gov't Br. at 33-34. In another case that actually involved § 1152(a)(1)(B), the Government argued that the legislative history behind this exception showed that it "was intended *not to change the law*, but rather to 'clarify' that 8 U.S.C. § 1152(a)(1) does not apply to the Secretary's consular venue determinations." Gov't Reply Br. in *U.S. Dep't of State, Bureau of Consular Affairs v. Legal Assistance for Vietnamese Asylum Seekers Inc*., 1996 WL 582487 (U.S.) (Appellate Brief) (emphasis added) (citation omitted). The Government cannot contend that § 1152(a)(1)(B) was not intended to change the law and then seek to apply it to an EO that creates new classes of inadmissible aliens.

In addition, it is a fundamental principle of statutory interpretation that an exception to a general rule should be narrowly construed. *Corn Prods. Refining Co. v. Comm'r,* 350 U.S. 46, 52 (1955); *Piedmont & N. Ry. Co. v. Interstate Commerce Comm'n,* 286 U.S. 299, 311-12 (1932). Since § 1152(a)(1)(B) is an exception to the general non-discrimination rule set forth in § 1152(a)(1)(A), the word "procedures" in that exception must be narrowly construed.

The canon that remedial statutes should be liberally construed is also relevant to determining the scope of the non-discrimination requirement in § 1152(a)(1)(B). *See, e.g., First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 867 (4th Cir. 1989) ("CERCLA, as all remedial statutes, must be given a broad interpretation to effect its ameliorative goals."); *United States v. Hunter*, 459 F.2d 205, 215 (4th Cir. 1972) ("We cannot condone an interpretation which would circumnavigate congressional intent in this remedial statute designed to eliminate the humiliation and social cost of racial discrimination."). Because the non-discrimination requirement was a remedial provision added to the INA in 1965 to end discrimination based on national origin, it should be liberally construed.

The Government's interpretation of § 1152(a)(1)(A) and § 1182(f) contradicts one of the most basic principles of statutory interpretation because it would render the non-discrimination requirement meaningless. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("The cardinal principle in statutory interpretation is to save and not to destroy."). The Government argues that "when an alien subject to the Order is denied an immigrant visa, he is not suffering discrimination on the basis of nationality of the sort prohibited by Section 1152(a)(1)(A); instead he is being denied a visa because he has been validly barred from entering the country." Gov't Br. at 33. Under this interpretation, an Executive Order (or any law) that introduces new grounds of inadmissibility based on race, sex, nationality, place of birth, or place of residence would never run afoul of the non-discrimination provision because visas would simply be denied to individuals who have been "validly barred" from entering the country. This is a complete end-run around the non-discrimination requirement in § 1152(a)(1)(A), stripping it of all meaning.

Finally, interpreting § 1182(f) in a way that does not undercut the nondiscrimination principle in § 1152(a)(1)(A) is consistent with the past practice of Presidents, none of whom have issued an Executive Order or Proclamation that discriminated based on nationality alone. When prior Presidents invoked § 1182(f), they barred more narrowly defined groups. For example, President Reagan barred members of the Cuban government[5] and Nicaraguan government officers and employees.[6] President George H. W. Bush barred undocumented aliens traveling by sea.[7] President Clinton barred members of the military junta in Sierra Leone (or their family members),[8] members of the Sudanese government and armed forces,[9] and individuals who impeded Nigeria and former Zaire's transitions to democracy.[10] President George W. Bush barred government officials who impeded anti-trafficking efforts.[11] President Obama barred individuals who had participated in serious human rights and humanitarian law violations[12] and those subject to U.N. Security Council travel bans.[13] Never before has an executive order issued pursuant to any section of the INA applied a blanket ban based on nationality

[5] Proclamation 5377, 50 Fed. Reg. 41329 (Oct. 10, 1985).
[6] Proclamation 5887, 53 Fed. Reg. 43184 (Oct. 22, 1988).
[7] Executive Order 12807, 57 Fed. Reg. 23133 (May 24, 1992).
[8] Proclamation 7062, 63 Fed. Reg. 2871 (Jan. 16, 1998).
[9] Proclamation 6958, 61 Fed. Reg. 60007 (Nov. 26, 1996).
[10] Proclamation 6636, 58 Fed. Reg. 65524 (Dec. 10, 1993) (Nigeria); Proclamation 6574, 58 Fed. Reg. 34209 (Jun. 21, 1993) (Zaire).
[11] Proclamation 8342, 74 Fed. Reg. 4093 (Jan. 16, 2009).
[12] Proclamation 8697, 76 Fed. Reg. 49277 (Aug. 4, 2011).
[13] Proclamation 8693, 76 Fed. Reg. 44751 (Jul. 24, 2011).

without other limiting criteria.[14] Nor has an executive order ever been used to bar a class based on religion.[15]

B. If the Court Finds an Irreconcilable Conflict, § 1152(a)(1)(A) Should Prevail Because it is More Specific and Later Enacted.

If the Court finds that § 1152(a)(1)(A) and § 1182(f) cannot be harmonized, the next step is to apply the canon that more specific enactments control over more general ones. *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.'") (citation omitted). Here, § 1152(a)(1)(A) is a more specific provision than § 1182(f), because the former prohibits discrimination in the issuance of immigrant (permanent) visas based on express grounds, including nationality, while the latter provides a general grant of authority to the President to suspend entry of classes of aliens. Thus, to the extent that there is a conflict between the two provisions, § 1152(a)(1)(A) must supersede § 1182(f).

In addition, later enactments supersede earlier ones. *See, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (holding that repeal by implication may be found where there is irreconcilable conflict between provisions of earlier

[14] Kate M. Manuel, Cong. Research Serv. R44743, *Executive Authority to Exclude Aliens: In Brief*, 6-10 (Jan. 23, 2017).
[15] *Id.*

and later enactments); *McLean v. Cent. States, Se. & Sw. Areas Pension Fund*, 762 F.2d 1204, 1209 (1985) (same). Here, § 1152(a)(1)(A) was enacted in 1965, while § 1182(f) was enacted in thirteen years earlier, as part of the Immigration and Nationality Act of 1952. The later-enacted non-discrimination requirement therefore controls the earlier-enacted authority to suspend entry of classes of aliens.

C. The Government's Reliance on § 1185(a)(1) is Misplaced Because It Applies to Travel Documentation and Cannot Undermine the Nondiscrimination Requirement.

The Government also mistakenly asserts § 1185(a)(1) authorizes the President to issue an EO that would result in violations of the non-discrimination requirement. The title of § 1185 is "Travel Documentation of Aliens and Citizens," and § 1185(a)(1) makes it unlawful "for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe." 8 U.S.C. § 1185(a)(1). The authority to regulate travel documentation in § 1185(a)(1) does not mean the President also has the authority to determine the substantive criteria for the issuance of visas. Instead, those criteria are expressly set forth by Congress in 8 U.S.C. §§ 1151-1153, and § 1152(a)(1)(A) specifically prohibits discrimination on the basis of national origin in the issuance of visas.

Looking at other provisions of § 1185(a)(1) further underscores the difference between regulation of travel documentation and the issuance of visas. *See United States v. Broncheau*, 645 F.3d 676, 685 (4th Cir. 2011) ("adjacent statutory subsections that refer to the same subject matter should be read harmoniously") (internal quotations omitted). The adjacent provisions address travel documentation not only for aliens, but also for U.S. citizens. For example, § 1185(a) makes it unlawful to use permits to enter the U.S. that were issued to another person, to forge entry documents, to use forged documents, or to furnish such forged documents to another person. 8 U.S.C. §§ 1185(a)(4)-(a)(7).

Similarly, § 1185(b) requires U.S. citizens to have a U.S. passport to enter or depart the country. Since § 1185 addresses travel documents for U.S. citizens, not just aliens, it clearly deals with a different subject from the issuance of visas. *See Kent v. Dulles*, 357 U.S. 116, 124 (1958) (noting that 8 U.S.C. § 1185 resulted from a 1918 Act that "made it unlawful, while a Presidential Proclamation was in force, for a citizen to leave or enter the United States 'unless he bears a valid passport'"). The Government cannot, therefore, rely on § 1185 to justify an EO that would halt the issuance of visas based on nationality.

II. CONDITIONS FOR NONIMMIGRANT (TEMPORARY) VISAS MUST BE PROMULGATED THROUGH REGULATION.

The Government also contends that the injunction was over-inclusive in including individuals seeking nonimmigrant (temporary) visas, since § 1152(a) of the INA only applies to immigrant (permanent) visas. This argument is unpersuasive because the EO conflicts with another statutory provision—8 U.S.C. § 1184(a)(1), which provides that conditions governing nonimmigrant (temporary) visas should be established by *regulation*. Such regulations would normally undergo the notice and comment process, which was circumvented here. Even if the Court finds that the INA does not require conditions on nonimmigrant (temporary) visas to be promulgated by regulation, the APA requires it, because the EO imposes substantive rules that do not fall under any of the exceptions to notice and comment set forth in the APA.

A. The EO Violates § 1184(a)(1) of the INA, Which Requires Conditions on Nonimmigrant (Temporary) Visas to be Issued by Regulation.

The INA states "[t]he admission to the United States of any alien as a nonimmigrant shall be for such time and under such conditions as the Attorney General may *by regulations* prescribe." 8 U.S.C. § 1184(a) (emphasis added). In construing a statute, the court must attempt to read all parts of the statute harmoniously, if reasonably possible. *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989). The President's authority under § 1183(f) and § 1185(a)(1) should not be interpreted so broadly as to allow the President to do through an Executive Order what Congress said should be done through regulation.

The title of § 1184(a)(1) is "Regulations," which reinforces the plain language stating that conditions prescribing conditions on nonimmigrant (temporary) visas shall be established by regulation. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("'[T]he title of a statute and the heading of a section' are 'tools available for the resolution of a doubt' about the meaning of a statute.") (citation omitted); *see also INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991).

Consistent with this interpretation, in prior situations where executive orders placed limitations on nonimmigrant (temporary) visas pursuant to executive orders, those limitations were prescribed by regulation. For example, after the Iranian hostage crisis, President Carter issued Executive Order 12170, invoking his authority under § 1185(a)(1) to "prescribe limitations and exceptions on the rules and regulations" governing Iranians holding nonimmigrant (temporary) visas. Pursuant to that Executive Order, *a regulation was promulgated* that required Iranian students with nonimmigrant (temporary) visas to provide information as to residence and maintenance of nonimmigrant (temporary) status. *See Narenji v. Civletti*, 617 F.2d 745, 747 (D.C. Cir. 1979) (upholding the regulation that imposed reporting requirements on nonimmigrant (temporary) Iranian students because the regulation was "directly and reasonably related to the Attorney General's duties and authority under the Act"), *cert. denied*, 445 U.S. 957 (1980).

Subsequently, President Carter severed diplomatic relations with Iran and simultaneously ordered that steps be taken to make "clear that the failure to release the hostages will involve increasingly heavy costs to Iran and to its interests." President's Announcement of Sanctions Against Iran, 16 Weekly Comp. of Pres. Doc. 611 (Apr. 7, 1980). President Carter directed the Secretary of State and the Attorney General to invalidate all visas issued to Iranian nationals for future entry into the United States and not to reissue visas to Iranian aliens already in the United States. Pursuant to that proclamation, the Acting Commissioner of the INS, issued orders *amending INS regulations* to state that Iranians with temporary status were ineligible for extensions of stay and change of visa classification, with narrow exceptions.[16] *See Najafi v. Civiletti*, 511 F. Supp. 236, 237-38 (W.D. Mo. 1981) (explaining the amended regulation).

Unlike past practice, no regulations have been promulgated pursuant to the EO to prescribe limitations on the issuance of nonimmigrant (temporary) visas to individuals from the six affected countries.

B. The EO Circumvents Valuable Notice and Comment Procedures.

[16] Because the amended regulations were promulgated in response to the international crisis created by the seizure of American citizens at the Embassy in Tehran, the formal rulemaking procedures prescribed in the Administrative Procedure Act were not followed and the amendments became effective immediately.

Because the INA expressly provides that conditions on nonimmigrant (temporary) visas should be promulgated *by regulation*, Congress intended normal notice and comment procedures to be followed. As this Court has recognized, "[t]he important purposes of [] notice and comment procedure cannot be overstated." *N. Carolina Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012). The agency benefits from the experience and input of comments by the public, which help "ensure informed agency decision-making." *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314, 321 (4th Cir. 1980). The notice and comment procedure also is designed to encourage public participation in the administrative process. *See Chocolate Mfrs. Ass'n v. Block,* 755 F.2d 1098, 1103 (4th Cir. 1985). Additionally, "the process helps ensure that the agency maintains a flexible and open-minded attitude towards its own rules, . . . because the opportunity to comment must be a meaningful opportunity . . .." *N. Carolina Growers' Ass'n*, 702 F.3d at 763 (internal quotations and citation omitted).

Only in exceptional circumstances can the government circumvent notice and comment procedures. Under the APA, there is an exception "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C.

§ 553(b)(3)(B). This Court has repeatedly stressed that it "construe[s] the good cause exception narrowly." *N. Carolina Growers' Ass'n*, 702 F.3d at 767; *see also United States v. Gould*, 568 F.3d 459, 569 (4th Cir. 2009). "There is a high bar" and "the circumstances justifying reliance on the good cause exception are rare, and will be accepted only after a reviewing court 'examine[s] closely' the proffered reason for an agency's deviation from public notice and comment." *N. Carolina Growers' Ass'n*, 702 F.3d at 767 (internal quotation marks omitted).

Indeed, "[t]he good cause exception applies only in emergency situations, or in cases when delay could result in serious harm." *Id.* (internal quotation marks and citation omitted). Here, the Government has failed to demonstrate a true emergency. To begin with, the passage of over three months since the first travel ban was issued without any threats or incidents of harm shows that it was not "impracticable" for the Government to undertake public rulemaking proceedings and still carry out its functions.

Furthermore, the "unnecessary" prong only "applies when an administrative rule is 'a routine determination, insignificant in nature and impact, and inconsequential to the industry and to the public.'" *Id.* That is hardly the case here, as the travel ban had an enormous impact when it was first issued, causing chaos at numerous airports, will have significant effects if it goes into effect in its current form, and has been of enormous public interest. By contrast, "Congress intended that rulemaking be exempted as 'unnecessary' when amendments are 'minor or merely technical,' and of little public interest." *Id.*

The third statutory ground for good cause addresses circumstances when notice and comment are "contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). "This public interest prong of the good cause exception connotes a situation in which the interest of the public would be defeated by any requirement of advance notice." *Id.* (internal quotation omitted). It only applies when notice and comment "would in fact harm [the public] interest.'" *Id.* This exception also does not apply here, since advance notice was, in fact, given for the second travel ban, due to the delay between when it was issued (March 6, 2017) and when it was supposed to take effect (March 16, 2017). *See* Sec. 14 of the EO. That formal ten-day notice was on top of the informal notice given by the issuance first travel ban on January 27, 2017. Since none of the exceptions to notice and comment apply, the conditions on nonimmigrant (temporary) visas imposed by the EO should have been issued by regulation after normal rulemaking procedures based on the plain language of the statute.

C. Even if the INA Does Not Require Conditions on Nonimmigrant (Temporary) Visas to be Made by Regulation, the APA Requires It.

Although the President is not an "agency" under the APA, *Franklin v. MA,* 505 U.S. 788, 797 (1992), an agency's implementation of presidential directives must still conform to the APA. *See, e.g.*, *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1327 (D.C. Cir. 1996) ("that the Secretary's regulations are based on the President's Executive Order hardly seems to insulate them from judicial review under the APA, even if the validity of the Order were thereby drawn into question.); *Public Citizen v. United States Trade Representative*, 5 F.3d 549, 552 (D.C. Cir. 1993) (noting that the denial of judicial review over presidential actions "is limited to those cases in which the President has constitutional or statutory responsibility for the *final step* necessary for the agency action directly to affect the parties") (emphasis added). Where, as here, immigration decisions require action by administrative officials, courts routinely apply the APA and administrative law doctrines.

Thus, even if the Court finds that the INA does not require conditions on nonimmigrant (temporary) classifications to be made by regulation, such conditions should be promulgated using notice and comment rulemaking under the APA. The APA requires the executive to follow certain procedures before issuing a rule that creates new law affecting the rights or duties of those being regulated. 5 U.S.C. § 553. When engaged in such rulemaking, the agency must: (1) publish a general notice of proposed rulemaking in the Federal Register that includes "the terms or substance of the proposed rule or a description of the subjects and issues involved;" (2) give "interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments;" and (3) "[a]fter consideration of the relevant matter presented . . . incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(b)-(c).

Because the EO is a legislative rule that does not fall under any of the exceptions to notice and comment procedures, including the good cause exception discussed above, the APA requires that it undergo the normal rulemaking process required by APA. *Cf. Texas v. United States,* 809 F.3d 134 (5th Cir. 2015) (finding a likelihood of success with respect to the argument that President Obama's Deferred Action for Childhood Arrivals program should have gone through notice and comment procedures and rejecting the Government's argument that the program was a policy statement exempt from those procedures), *affirmed by an equally divided court*, *United States v. Texas*, 136 S.Ct. 906 (2016).

Indeed, here, the Government has not even invoked the good cause exception (or any other exception) to notice and comment, much less incorporated the finding of good cause and a brief statement of reasons therefore into the EO. 5 U.S.C. § 553(b). "This requirement, that an agency articulate its basis for dispensing with normal notice and comment, is not a procedural formality but serves the crucial purpose of ensuring that the exceptions do not swallow the rule." *N. Carolina Growers' Ass'n*, 702 F.3d at 766 (internal quotations omitted). By failing to go through notice and comment in issuing a rule that affects rights and duties, the Government has violated the APA. *See also* Jill Family, *The Executive Power of Process in Immigration Law*, 91, CHI-KENT L. REV. 1, 89 (2016) ("Political and historical forces have pushed us toward a time of strong executive discretionary power over immigration law. With that power is a need for greater procedural protections.").

III. THE EO FAILS TO SATISFY EVEN THE MINIMAL "FACIALLY LEGITIMATE AND BONA FIDE" STANDARD FOR VISA DENIALS.

The Government argues that the "facially legitimate and bona fide" standard in *Kleindienst v. Mandel*, 408 U.S. 753, 769 (1982), applies to the EO. Gov't Br. at 35-42. However, the EO fails to satisfy even that standard. Even assuming that national security provides a facially legitimate reason for the EO, it is not a bona fide reason.[17] The "facially legitimate" and "bona fide" prongs of the test are distinct. *See Bustamante v. Mukasey*, 531 F.3d 1059, 1062–63 (9th Cir. 2012) (examining the "bona fide" prong separately). The "bona fide" part of the test requires a court to distinguish between good faith reasons and pretextual excuses.

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[17] The evidence submitted in this case calls into question whether national security is legitimate with respect to the present situation. For example, in a joint affidavit, ten former national security, foreign policy, and intelligence officials who served in both Republican and Democratic Administrations, four of whom were aware of intelligence relating to potential terrorist threats to the United States as of January 19, 2017, stated that "there is no national security purpose for a total bar on entry for aliens" from the designated countries, and no intelligence suggested any potential threat from nationals of those countries. J.R. 404, 406. *Cf. Kleindienst*, 408 U.S. at 769 (finding a "facially legitimate and bona fide" reason for the denial of a visa to an individual who had violated the conditions of his visa on two prior trips); *Kerry v. Din*, 135 S.Ct. 2128, 2140 (2015) (finding a "facially legitimate and bone fide" reason for the denial of a visa to an Afghan national who had previously been employed by the Taliban).

Here, there is substantial evidence that the ban was motivated by animus against Muslims. On January 27, 2017, the date that the first travel ban was issued, President Trump publicly stated that the order would give preference to Christian refugee applications. J.R. 201. The next day, New York City Mayor Rudolph W. Giuliani stated on Fox News that President Trump had told him he wanted a Muslim ban and asked Giuliani to show him "the right way to do it legally." J.R. 247. When Stephen Miller, Senior Policy Advisor to the President, described the EO at issue in this case, he stated that there were "mostly minor technical differences," stressing that the "basic policies are still going to be in effect." J.R. 319; *see also* J.R. 118. On March 7, 2107, Secretary of Homeland Security Kelly stated that the EO focused on countries with "questionable vetting procedures," but then acknowledged that there are 13 or 14 such countries, "not all of them Muslim countries and not all of them in the Middle East," J.R. 150, yet the EO targets only Muslim countries. The plain language in § 11 specifically singles out honor killings, a practice that takes place primarily in Muslim countries. Thus, even without relying on the multitude of anti-Muslim statements made by President Trump during his campaign, the cumulative post-inauguration evidence demonstrates that the EO was not issued in good faith, but was rather a pretext for barring Muslims from the United states.

IV. THE CONSULAR NONREVIEWABILITY DOCTRINE DOES NOT BAR PLAINTIFFS' CLAIMS.

Contrary to the Government's arguments, the doctrine of consular nonreviewability does not prohibit judicial review in this case because of two well-established exceptions to that doctrine. First, Plaintiffs allege violations of their own constitutional rights, as well as statutory violations. Second, the instant suit challenges consular officials' authority to take or fail to take an action, as opposed to consular officials' discretionary authority.

A. Plaintiffs Allege Violations of Their Own Constitutional Rights, As Well As Statutory Violations.

The Government erroneously contends that Plaintiffs have alleged no violations of their *own* constitutional rights. Gov't Br. at 26-27. However, Plaintiffs have clearly asserted a violation of the Establishment Clause, which protects their rights as U.S. citizens to live in a secular country that neither advances nor inhibits religion, mandates governmental neutrality between religions, and does not foster excessive government entanglement with religion. *See Epperson v. Arkansas,* 393 U.S. 97, 104 (1989); *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971).

As long as Plaintiffs raise constitutional claims, the court also has jurisdiction over their statutory claims. *See Abourezk v. Reagan*, 785 F.2d 1043, 1052 (D.C. Cir. 1986), *aff'd by an equally divided court*, 484 U.S. 1 (1987) (reasoning that the court had "an independent obligation to consider questions of statutory construction . . . in order to avoid a constitutional confrontation . . . ."); *see also Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 124 (2d Cir. 2009) ("*Abourezk II* accepted jurisdiction over First Amendment and statutory challenges to decisions of consular officers and the Secretary of State."). The Government's reliance on *Saavedra* is misplaced, because in that case, the Plaintiff's American sponsors raised no constitutional claims, whereas here, as in *Abourezk*, Plaintiffs raise both constitutional and statutory claims. *Saavedra Bruno v. Albright*, 197 F.3d 1153, 1163–64 (D.C. Cir. 1999).

B. This Lawsuit Challenges the Government's Authority to Take or Fail to Take an Action, Not a Discretionary Decision in a Particular Case.

Furthermore, the Government fails to recognize a second exception to the consular nonreviewaiblity doctrine: "when [the] suit challenges the authority of the consul to take or fail to take an action as opposed to a decision within the consul's discretion." *Patel v. Reno*, 134 F.3d 929, 931–32 (9th Cir. 1997); *Rivas v. Napolitano*, 714 F.3d 1108, 1110 (9th Cir. 2013). That exception also applies here, as Plaintiffs seek to ensure that consular officials process visa applications in a lawful manner, not that they exercise their discretion to reach a particular result. The EO would prohibit consular officials from issuing visas to individuals from certain countries, and plaintiffs are challenging the President's authority to take that action.[18]

CONCLUSION

Based on the foregoing, the law and facts support the district court's conclusion that Plaintiffs have established a likelihood of success on the merits of the statutory arguments arising under the INA. Implementation of the EO would result in statutory violations with respect to the issuance of both immigrant (permanent) and nonimmigrant (temporary) visas.

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Respectfully submitted,

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[18] Courts have also questioned whether the doctrine of consular nonreviewability actually imposes a jurisdictional bar. *See, e.g.*, *Am. Acad of Religion*, 573 F.3d at 123.

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CERTIFICATION OF COMPLIANCE

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)(a) and (a)(6) because it has been prepared in a proportionally spaced typeface, using Microsoft Word in Times New Roman 14-point font.

This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) because it contains 6,469 words. (The maximum number of words is 6,500 for an *amicus* brief in connection with a principal brief, which has a word limit of 13,000 words under Fed. R. App. P. 32(a)(7)(B)).

No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person contributed money that was intended to fund preparing and submitting this brief. Fed. R. App. P. 29(a)(4)(E).

Dated: April 21, 2017

/s/ Fatma E. Marouf

Fatma E. Marouf

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2017, I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: April 21, 2017

Respectfully submitted,

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